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No. 91-7002

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1991

CLARK ALBERT BAILEY,
Petitioner,

v.

ARTHUR E. NOOT, ORVILLE PUNG, CHARLES G. SHEPPARD, LESLIE R. GREEN, WILLIAM F. McCRAE, BRUCE M. BELTT, RICHARD A. ALSTAD, JAMES BRUTON, HENRY GREENCROW, and DOROTHY SKWIERA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This Reply Brief is submitted on behalf of Petitioner Clark Albert Bailey ("Bailey") in response to the Brief in Opposition filed by the Respondents (collectively "the State"). In its Brief in Opposition, the State contends that Bailey's petition for a writ of certiorari on his ex post facto law claim should be denied because the revised Minnesota regulations which are admittedly being applied retroactively are not laws for purposes of the ex post facto clause. Alternatively, the State argues that the new regulations do not substantially disadvantage Bailey. In making these arguments, the State ignores binding Minnesota statutory and case law, relies upon inapposite cases arising under the federal parole guidelines, and makes arguments which have been previously rejected by this Court.

With regard to Bailey's petition for a writ of certiorari on his Fourteenth Amendment claim, the State admits that this Court has never addressed the important issue raised by that claim. Instead, the State lamely suggests that this Court should allow "more courts of appeal to grapple with" the issue. (Brief in Opposition at 16.) The State further raises arguments never addressed or decided by the Eighth Circuit in the underlying decision. In any event, the arguments raised by the State are without merit. This Court should grant Bailey's Petition for a Writ of Certiorari in its entirety.

ARGUMENT

I. BAILEY'S EX POST FACTO LAW CLAIM RAISES IMPORTANT, UNRESOLVED ISSUES OF CONSTITUTIONAL LAW ON WHICH A SPLIT IN THE CIRCUITS EXISTS.

Bailey's ex post facto law claim raises important, unresolved issues of constitutional law on which a split in the circuits exists. The State attempts to argue that no important unresolved issue or split in the circuits exists by

claiming that cases holding the federal parole guidelines are not laws support the Eighth Circuit's decision in this action. Those cases have no relevance to the issues raised in this Petition, however. To the extent the reasoning of thos cases does have relevance, the reasoning applied in the federal parole guideline cases supports Bailey's Petition. In addition, the State's argument that Bailey has not been substantially disadvantaged by the retroactive application of the new Minnesota regulations is directly contrary to this Court's previous decisions.

A. The Federal Parole Guideline Cases Are Inapposite To This Petition.

The State first attempts to claim that the decision of the Eighth Circuit is supported by the numerous decisions from other circuits holding that the federal parole guidelines are not laws. Yet, as the State itself recognizes, "the Minnesota parole rules, not the federal regulations, are at issue in the instant matter." (Brief in Opposition at 8.) Unlike the federal regulations, the new Minnesota regulations, by statute and case law, have the force and effect of law and may not be disregarded by the Office of Adult Release ("OAR"). *See* Minn. Stat. § 14.38, subd. 1; *State v. Hopf,* 323 N.W.2d 746, 752 (Minn. 1982); *State ex rel. Indep. Sch. Dist. No. 6 v. Johnson,* 242 Minn. 539, 548, 65 N.W.2d 668, 673 (1954). Nowhere in its Brief in Opposition does the State address this fact.[1]

Moreover, the State misinterprets the federal parole guideline cases by suggesting those decisions held that changes in the federal guidelines did not violate the ex post facto clause *either* because the statutory discretion remained unchanged *or* because the regulations were non-bining guidelines. These factors are not independent grounds for the holdings; both are necessary. No federal

[1] Indeed, an assistant Minnesota attorney general, several of the individual respondents, and their agents have repeatedly stated that the new regulations have the force and effect of law and cannot be disregarded. (*See* Bailey's Appendix in the Eighth Circuit at 15-18, 20, 75-77, 79, 82-84, 88-89, 90-91, 111, 200-02.)

parole guideline case simply looked at the statutory discretion of the paroling authority and held that because that discretion remained unchanged, the ex post facto clause was not violated. Rather, every case, after ascertaining that the statutory authority remained unchanged, went on to examine whether the discretion left to the agency under its *own regulations* also remained unchanged. *See, e.g., Prater v. United States Parole Comm'n,* 802 F.2d 948, 953-54 (7th Cir. 1986) (*en banc*). The State's argument that because the *statutory* discretion of the parole authority remains unchanged, Bailey's ex post facto rights have not been violated simply begs the question. Bailey does not allege that the ex post facto clause was violated by an amendment to the statute. He alleges that the clause was violated when binding regulations were promulgated that eliminated the very discretion granted under the statute. The fact that discretion still exists under the statute to parole Bailey at any time does not do him any good when, under the terms of binding regulations, that discretion can no longer be exercised. Adoption of the State's argument would mean the end of the ex post facto clause, because it would permit the legislature to do indirectly what it clearly cannot do directly. *See, e.g., Yamamoto v. United States Parole Comm'n,* 794 F.2d 1295, 1300 (8th Cir. 1986); *Rodriguez v. United States Parole Comm'n,* 594 F.2d 170, 173 (7th Cir. 1979). Even though the State retains the authority to amend the regulations, the new regulations still violate the ex post facto clause. Every legislature has the power to amend its laws and every agency its regulations. The existence of that power is the *reason* for the ex post facto clause.

The State points out that the new regulations permit a change in release dates to correct mathematical errors or to reflect system-wide policy changes. But the State's discretion under the old regulations was far broader. In particular, under the old rules, the Commissioner had discretion to parole an inmate at any time based on individualized consideration of the circumstances of his

case. Inmates were reviewed annually to consider whether their release dates should be changed. The State admits that under the statute and rules in effect at the time Bailey committed his crimes, "the law provided that a state agency had complete discretion regarding parole." (Brief in Opposition at 9.) The new regulations take away the discretion. Under the current statute and new regulations, Bailey's release date of the expiration of his sentence "will be left in full force and effect by the commissioner." 3 Minn. Rules § 2940.1500, subp. 2. He is no longer eligible for parole. He has not received any annual reviews at which his release date could be changed for over ten years. Indeed, the lower courts found that "the current OAR regulations are less favorable than the former MCB [Minnesota Corrections Board] guidelines." (Magistrate's Report and Recommendation, dated March 23, 1988, at 8.)

The State also claims that the new Minnesota regulations which are being retroactively applied to Bailey do not contravene the policies underlying the ex post facto clause, because Bailey had fair notice that the statute and regulations which were in existence at the time he committed his crimes could be changed. This argument was rejected by this Court in *Miller v. Florida,* 482 U.S. 423, 431 (1987). As this Court ruled in that decision, the constitutional prohibition against ex post facto laws cannot be avoided merely by warning a person that a law, like any other law, is subject to revision. *Id.*

Thus, as set forth in Bailey's Petition, the reasoning applied by the Eighth Circuit to determine whether regulations are laws for purposes of the ex post facto clause is contrary to the reasoning adopted by other circuits and to the method for analyzing ex post facto law claims previously announced by this Court. (*See* Petition for a Writ of Certiorari at 10-16.) If the reasoning adopted by the Eighth Circuit is permitted to stand, then the ex post facto clause is effectively read out of existence. *See Bailey v. Noot,* 940 F.2d 1150, 1158-59 (8th Cir. 1991) (Lay, C.J., dissenting). Bailey's Petition should be granted to address and resolve these issues.

B. The New Minnesota Regulations Substantially Disadvantage Bailey

The State finally argues that even if the Minnesota regulations which are being retroactively applied are considered laws for purposes of the ex post facto clause, no violation exists because they do not substantially disadvantage Bailey. The State contends that because Bailey's quantum of punishment has not changed, and because Bailey cannot show that he would have received a more favorable parole determination under the old regulations as opposed to the new, no ex post facto law violation exists. (*See* Brief in Opposition at 10-12.)

This precise argument has twice been rejected by this Court. *See Miller v. Florida* 482 U.S. at 432; *Lindsey v. Washington,* 301 U.S. 397, 401-02 (1937). As this Court has stated, "one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the [punishment] he received under the new law was not more onerous than that which he might have received under the old." *Dobbert v. Florida,* 432 U.S. 282, 300 (1977). It is the elimination of discretion to parole Bailey that causes the new regulations to run afoul of the ex post facto clause. Bailey's point is that the statutory discretion can no longer be exercised because of the new regulations.

Moreover, the State's effort to distinguish the directly contrary decision of the Eleventh Circuit in *Akins v. Snow,* 922 F.2d 1558 (11th Cir.), *cert. denied,* ___ U.S. ___, 111 S.Ct. 2915 (1991), simply fails. The fact that the statute in *Akins* required an annual hearing to consider parole is no different than the undisputed fact that in this case, the regulations in effect at the time of the commission of Bailey's crimes required annual reviews at which a prisoner could be considered for parole and his release date changed.[2] Under the new regulations, the OAR has no discretion to reconsider Bailey's release date or to

[2] *See* Minnesota Corrections Bd.: Adult and Youthful Offender Parole Policies and Procedures, §§ 7-101.15-.16, 7-101.19(a), 7-104.4(b) (July 1977) (reproduced in the Appendix to Bailey's Petition for a Writ of Certiorari at A-30-31.)

provide him with parole. No further annual reviews are given to Bailey. The Eleventh Circuit's reasoning and holding is directly contrary to that of the Eighth Circuit.

As expressed in Bailey's original Petition, every other circuit court which has considered the issue has determined that a change in parole eligibility to the detriment of a prisoner violates the ex post facto law clause. This Court has similarly held that depriving an inmate of the *opportunity* to shorten his confinement violates the ex post facto clause. (*See* Petition for a Writ or Certiorari at 12-15.) This Court should grant this Petition to address these important, recurring constitutional law questions which are vital to the application of the ex post facto clause in the context of regulations affecting parole eligibility.

II. BAILEY'S RIGHT TO TREATMENT CLAIM PRESENTS AN IMPORTANT, UNRESOLVED ISSUE OF CONSTUTIONAL LAW.

The State admits that this Court has never squarely addressed the issue of whether a dangerous person civilly committed has a constitutional right to treatment under the Fourteenth Amendment. The Eighth Circuit held that no such constitutional right exists. The State lamely suggests that this Court should "allow more courts of appeal to grapple" with the issue. (Brief in Opposition at 16.)

However, this Court previously has addressed this issue in a number of similar contexts, and has always held that a constitutional right to treatment exists under the Fourteenth Amendment. In *O'Connor v. Donaldson,* 422 U.S. 563 (1975), this Court held that a civilly committed mentally ill person has a right to treatment under the Fourteenth Amendment. In *Youngberg v. Romeo,* 457 U.S. 307 (1982), this Court held that a civilly committed mentally retarded person had a constitutional right to receive treatment. In *Humphrey v. Cady,* 405 U.S. 504 (1972), this Court stated that allegations by a convicted criminal civilly committed to a state hospital facility that

he had been deprived of treatment raised substantial constitutional law claims. If all these individuals have a Fourteenth Amendment right to treatment, on what principled basis can Bailey be denied that right, especially since he was committed to receive "care, treatment, and custody"? (*See* Bailey's Appendix in the Eighth Circuit at 10, 191-92 (emphasis added).)

If a state is going to employ its inherent power to protect the public by civilly committing a person, then the *quid pro quo* for such commitment must be the obligation of the state to provide minimally adequate treatment such that the committed person has a reasonable opportunity to end the commitment. A failure to require such treatment turns the civil commitment into an indefinite or life term of imprisonment without any of the protections inherent in the criminal justice system. It would be no different than if a state indefinitely committed a person who was incompetent to stand trial, *see Jackson v. Indiana,* 406 U.S. 715 (1972), or indefinitely incarcerated an individual pending trial, or simply incarcerated a person for life regardless of the crime via civil commitment.

The Fifth Circuit, in describing its decision in *Donaldson v. O'Connor* stated:

> In *Donaldson,* we held that civilly committed mental patients have a constitutional right to such individual treatment as will help each of them to be cured or to improve his or her mental condition. We reasoned that the only permissible justifications for civil commitment, and the massive abridgements of constitutionally protected liberties it entails, were the danger posed by the individual committed to himself or to others or the individual's need for treatment and care. We held that where the justification for commitment was treatment, it offended the fundamentals of due process if treatment were not in fact provided; and we held that where the justification was the danger to self or to others, then treatment had to be provided as the *quid pro quo* society had to pay as the price of the extra safety it derived from the denial of the individual's liberty.

Wyatt v. Aderholt, 503 F.2d 1305, 1312 (5th Cir. 1974). If the state of Minnesota is going to obtain for its citizens some additional measure of safety by civilly committing Bailey in addition to convicting him of a crime, then the State must provide him with a reasonable opportunity to be relieved of that commitment. Every other circuit court which has considered the right to treatment of a civilly committed person has found that such a right exists. This Court should grant Bailey's Petition to address this important issue, and to resolve the split between the circuits created by the Eighth Circuit's decision.

Recognizing the need for this Court to grant Bailey's Petition to address this issue, the State raises two issues which were not decided by the Eighth Circuit. The State claims that it is qualifiedly immune from damages on Bailey's right to treatment claim, and that it is entitled to judgment as a matter of law. This Court should not consider fact-bound arguments which were never addressed by the Eighth Circuit.[3]

In any event, the State is not qualifiedly immune from Bailey's claims based upon analogous and similar decisions which clearly presaged or announced a Fourteenth Amendment-based right to treatment for dangerous civilly committed persons. (See cases cited at pages 18-19 of Bailey's Petition for a Writ of Certiorari.) Morever, the State remains liable to the extent Bailey has sought declaratory and injunctive relief requiring the State to provide him with treatment. *See Pulliam v. Allen,* 466 U.S. 522, 541-42 (1984); *Harlow v. Fitzgerald,* 457 U.S. 800, 819 n.34 (1982). Furthermore, this Court's decision in *Youngberg* does not mean the State is entitled to judgment as a matter of law. To the extent that decision is even applicable in this matter, Bailey's claim is not a dispute over the type of treatment to be provided. Rather, Bailey's

[3] Bailey vigorously contests these arguments and did so quite extensively in the court of appeals and district court.

claim is that he has been *denied* all treatment. No dispute between different treatment methods such as existed in *Youngberg* exists in this action.[4]

CONCLUSION

For the foregoing reasons, as well as those expressed in his Petition for a Writ of Certiorari, Petitioner Clark Albert Bailey prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit.

Dated: February 24, 1992.

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[4] The sworn testimony of Dr. Sheppard reveals that the State exercised no medical judgment in denying Bailey treatment. Instead, Bailey was simply "incarcerated" because Dr. Sheppard, in his own words, did not trust Bailey any farther than he could throw a piano and that opinion would not change while Bailey was under his care. (*See* Bailey's Appendix in the Eighth Circuit at 141, 145, 146.)